No. 86-1644

Supreme Court, U.S.
FILED
MAY 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

YAMHILL YAMAHA, INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# BRIEF IN OPPOSITION OF REAL PARTIES IN INTEREST

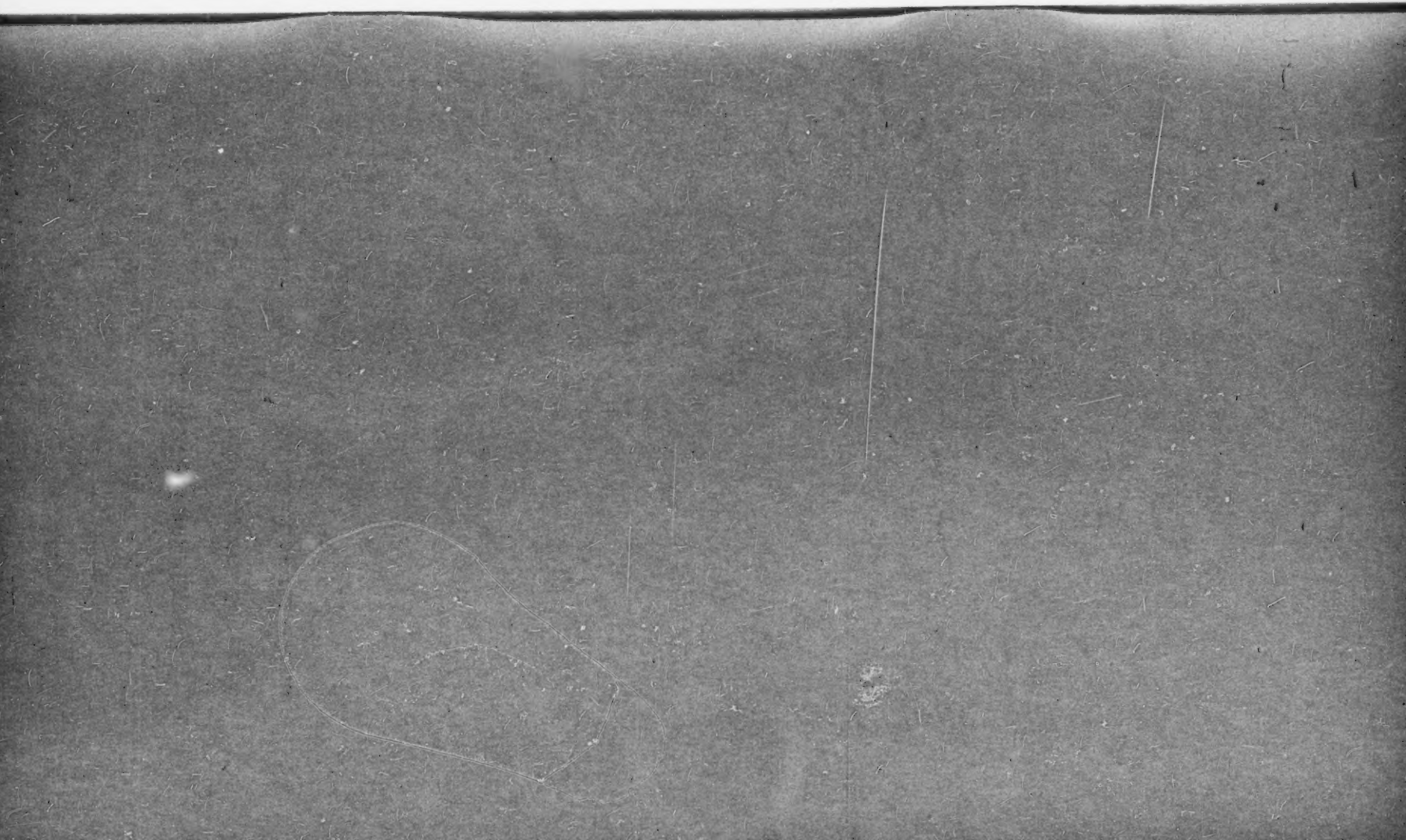
PETER C. RICHTER
WILLIAM H. WALTERS*
MILLER, NASH, WIENER,
HAGER & CARLSEN
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 224-5858

Attorneys for
Defendants Dean
Collins and Yamaha
Motor Corporation,
U.S.A.

JOHN H. HOLMES
HOLMES, DEFRANCO &
SCHULTE
811 S.W. Front Avenue
Portland, Oregon 97204
(503) 223-4131

Attorneys for
Defendant Beaverton
Motorcycles, Inc.

*Counsel of Record



## QUESTION PRESENTED

Did the United States Court of Appeals for the Ninth Circuit abuse its discretion under the All Writs Act, 28 USC § 1651, in denying the petition of the present petitioner for a writ of mandamus?

TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented . . . . . | i |
| Statement of the Case . . . . . | 2 |
| Reason for Denying the Writ . . . . | 5 |
| 1. The decision of the Ninth Circuit does not conflict with decisions of this Court . . . . . | 5 |
| 2. The decision of the Ninth Circuit is not "squarely in conflict with law of the Second Circuit" or other circuits . . . . . | 7 |
| 3. The Ninth Circuit properly concluded that this case "does not satisfy the guidelines for granting mandamus relief" . . . . . | 12 |
| 4. The district court correctly concluded that petitioner waived its right to jury trial . . . . . | 13 |
| Conclusion . . . . . | 15 |

# TABLE OF AUTHORITIES

Page

Bauman v. United States Dist. Court, 557 F2d 650 (9th Cir 1977) . . . . 12

Beacon Theatres v. Westover, 359 US 500 (1959) . . . . . 5, 6, 11,12

Black v. Boyd, 248 F2d 156 (6th Cir 1957) . . . . . 10

Bruce v. Bohanon, 436 F2d 733 (10th Cir 1970) . . . . . 10

Dairy Queen v. Wood, 369 US 469 (1962) . . . . . 6,11, 12

Filmon Process Corp v. Sirica, 379 F2d 449 (DC Cir 1967) . . . . 11

First Nat. Bank of Waukesha v. Warren, 796 F2d 999 (7th Cir 1986) . . . . . 11

General Tire & Rubber Company v. Watkins, 331 F2d 192 (4th Cir 1964), cert denied, 377 US 952 (1964) . . . . . 9

Higgins v. Boeing Co., 526 F2d 1004 (2d Cir 1975) . . . . . .7, 8

In re Don Hamilton Oil Co., 783 F2d 151 (8th Cir 1986) . . . . 11

In re Turpentine & Rosin Factors, 238 F2d 458 (5th Cir 1956) . . . . 10

In re Union Nacional de Trabajadores, 502 F2d 113 (1st Cir 1974), rev'd, 527 F2d 602 (1st Cir 1975) . . . . 8

In re Zweibon, 565 F2d 742 (DC Cir 1977) . . . . . 9

Myers v. United States Dist. Court, 620 F2d 741 (9th Cir 1980) . . . . . 10

No. 86-1644

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

YAMHILL YAMAHA, INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# BRIEF IN OPPOSITION
OF
REAL PARTIES IN INTEREST

## STATEMENT OF THE CASE

Respondents[1] supplement petitioner's statement as follows:

(1) In petitioner's first state court action, the named defendant removed the matter to federal court prior to filing an answer.

(2) At the time petitioner's first action was filed and removed, the rules for the Yamhill County Circuit Court for the State of Oregon, petitioner's chosen forum, required that a party wishing to

---

1 The present respondents are the real parties in interest and were denominated as such before the Ninth Circuit.

Respondent Yamaha Motor Corporation, U.S.A., is a wholly owned subsidiary of Yamaha Motor Co., Ltd., and has as a non-wholly owned subsidiary Yamaha Motor Manufacturing Corporation of America. Beaverton Motorcycles, Inc., has no parents, non-wholly owned subsidiaries, or affiliates.

have a trial by jury notify the court of this in writing.

(3) Petitioner did not notify the state court in writing that it wished to have a trial by jury.

(4) In petitioner's second state court action, the defendants removed the matter to federal court prior to filing answers.

(5) As stated by the district court judge, petitioner did not file a notice of jury demand in the two consolidated actions before the federal court until "seven to eight months after the last pleading directed to the action." (Petitioner's Supplemental Appendix, App. C.)

(6) In response to petitioner's motion for rehearing, the Ninth Circuit issued an Order stating that "[p]etitioner's motion for rehearing presents a

serious question regarding the necessity of filing a notice of demand for jury trial in the Circuit Court of Oregon for the County of Yamhill," and requested that respondents ("Real Parties in Interest" before the Ninth Circuit) answer.

(7) Respondents argued to the Ninth Circuit:

> (a) Mandamus was not appropriate because a substantive right to jury trial was not contested; rather, the question was simply whether petitioner, by its conduct, had waived its jury trial right, and
>
> (b) The district court had correctly decided the waiver issue, either because (1) Fed R Civ P 38(b) applies and petitioner failed to request a jury trial within the period specified by that rule, or

because (2) the Yamhill County Circuit Court required petitioner to make an express demand in order to claim a trial by jury, the court rule had the force and effect of state law, and, therefore, petitioner waived its right to trial by jury by failing to make a timely demand in federal court. Fed R Civ P 81(c).[2]

REASON FOR DENYING THE WRIT

1. The decision of the Ninth Circuit does not conflict with decisions of this Court.

Petitioner argues that the decision of the Ninth Circuit "squarely conflicts" with the decision of this Court in Beacon Theatres v. Westover, 359 US 500 (1959),

---

2 Respondents further argued that petitioner could not revive his extinguished right by the device of filing a second, substantially identical action. On this point, petitioner has not argued to the contrary.

and Dairy Queen v. Wood, 369 US 469 (1962). Petitioner is mistaken. Beacon Theatres and Dairy Queen protect the constitutional right to trial by jury in cases where parties join legal and equitable claims arising out of the same transaction. Such is not the case here. Justice Black, the author of both Beacon Theatres and Dairy Queen, observed in the latter opinion that "Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." 369 US at 473 (emphasis added). And the only issue which petitioner seeks to pursue here is whether it has "timely and properly demanded" a trial by jury.

2. The decision of the Ninth Circuit is not "squarely in conflict with law of the Second Circuit" or other circuits.

When petitioner states that "[i]n Higgins v. Boeing Co., 526 F2d 1004 (2d Cir 1975), the Second Circuit granted mandamus and compelled the District Court to place consolidated removed cases on the jury docket" (Petition, p. 16), petitioner misstates the holding of Higgins. Higgins remanded the cause "to the sound discretion of the district court * * *." 526 F2d at 1007 ("Our order * * * grant[s] the petition to the extent of directing the district court to consider the question whether, in the exercise of its sound discretion, the trial shall be by jury.").

In general, circuit courts in mandamus proceedings have responded to waiver and related issues on the particular

facts of the cases before them. By way of example, the cases cited by petitioner at pages 14-15 are briefly noted:

In re Union Nacional de Trabajadores, 502 F2d 113 (1st Cir 1974), rev'd, 527 F2d 602 (1st Cir 1975) (per curiam), took the position that in a criminal matter "any denial of mandamus should be made only if either the case has not been adequately presented or there is no such right to a jury trial." 502 F2d at 116. The court found that "the issue ha[d] been adequately raised," and, on the merits, held that 18 USC § 3692 "requires criminal contempt proceedings stemming from alleged violations of a NLRA injunction to be tried before a jury * * *." 502 F2d at 121.

Higgins v. Boeing Co., 526 F2d 1004 (2d Cir 1975) (per curiam), featured a case removed from New York state courts where New York law required a written demand for trial by jury--which had not been complied with--but also allowed the state

trial court discretion to relieve a party from the effect of failing to make a timely demand if no undue prejudice would result. The circuit court held that Fed R Civ P 81(c) should be read to accommodate the state court's discretion and, accordingly, directed the district court to exercise its sound discretion whether to allow a jury trial.

In re Zweibon, 565 F2d 742 (DC Cir 1977) (per curiam), held that a prior opinion of the court effectively amended the previous pleadings and raised an issue for the first time, and therefore the timeliness of a jury trial demand should be judged in terms of the date of the return of the court's mandate to the district court.

General Tire & Rubber Company v. Watkins, 331 F2d 192 (4th Cir 1964), cert denied, 377 US 952 (1964), held that a "notice" provided under 35 USC § 282 was not a pleading within the meaning of Fed R Civ P 38(b).

In re Turpentine & Rosin Factors, 238 F2d 458 (5th Cir 1956) (per curiam), denied a writ of mandamus because the denial of a jury trial by the trial court involved, or may have involved, exercise of its discretionary power.

Black v. Boyd, 248 F2d 156 (6th Cir 1957), held that a bankruptcy trustee, by filing a cross-claim in an equitable action, did not waive a right to jury trial.

In Myers v. United States Dist. Court, 620 F2d 741 (9th Cir 1980), the Ninth Circuit held that where a party in a removed action had made an untimely express demand for a jury trial in state court, but where the state court had exercised its discretion and granted the demand, the party had made a demand "in accordance with state law" for purpose of Fed R Civ P 81(c), and no further demand was required in federal court.

Bruce v. Bohanon, 436 F2d 733 (10th Cir 1970) held that the plaintiffs' claim that defendant

misappropriated business and trade information sounded in tort and was triable to a jury. The court further held that the plaintiffs had not waived their right to a jury trial by their counsel's statement of uncertainty whether the claim was legal or equitable in nature which had been made prior to making a jury trial demand.

Filmon Process Corp v. Sirica, 379 F2d 449 (DC Cir 1967) held that plaintiff's allegations did not entitle it to a jury trial.

First Nat. Bank of Waukesha v. Warren, 796 F2d 999, 1006 (7th Cir 1986), denied a writ for mandamus where on the facts of the case before it there was "no possibility of issue or claim preclusion" as had been prominent in Ex Parte Simmons, 247 US 231 (1918), Beacon Theatres, and Dairy Queen.

In re Don Hamilton Oil Co., 783 F2d 151, 152 (8th Cir 1986) (per curiam), denied the petition because "of the questionable nature of the legal issue presented * * *."

3. The Ninth Circuit properly concluded that this case "does not satisfy the guidelines for granting mandamus relief."

The Ninth Circuit cited Bauman v. United States Dist. Court, 557 F2d 650 (9th Cir 1977), which articulates guidelines for granting mandamus relief. Petitioner does not contest the general appropriateness of the Bauman guidelines. Petitioner objects only that these guidelines are not appropriate where petitioner seeks "to correct a violation of [the] fundamental right" to trial by jury. The district court, however, has not ruled that petitioner lacks a right to trial by jury. The district court has determined rather that petitioner waived this right. Thus this is not a case like Beacon Theatres and Dairy Queen where a court has refused to acknowledge a right to trial by jury by giving first hearing

to equitable claims with the resultant likelihood that a party's legal claims will be barred by issue or claim preclusion.

4. The district court correctly concluded that petitioner waived its right to jury trial.

The district court reached the correct result for either of two reasons. Petitioner's initial state action was removed to federal court prior to the filing of an answer. The district court correctly reasoned that "where a civil action is removed to federal court before all necessary pleadings have been served, Fed R Civ P 38 governing jury demands in ordinary federal civil actions is applicable." (Petitioner's Supplemental Appendix, App. C.)

Alternatively, as argued in detail to the Ninth Circuit, the Oregon law applicable in the court from which plaintiff's initial state action was removed required the parties to make an express demand for a jury trial. This requirement was stated by the local court rules of plaintiff's chosen forum, and these rules had the force and effect of state law. Petitioner did not demand a jury trial in state court. Therefore, petitioner waived its jury trial right by failing to make a timely demand in federal court. Fed R Civ P 81(c).

## CONCLUSION

For the several reasons given, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Peter C. Richter
William H. Walters
MILLER, NASH, WIENER,
HAGER & CARLSEN
111 S.W. Fifth Avenue
Portland, Oregon 97204

Attorneys for Defendants
Yamaha Motor Corporation,
U.S.A., and Dean Collins

John H. Holmes
HOLMES, DEFRANCQ & SCHULTE
811 S.W. Front Avenue
Portland, Oregon 97204

Attorneys for Defendant
Beaverton Motorcycles,
Inc.

Attorneys for Real Parties
in Interest

May 11, 1987